No. 3374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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HAWAIIAN PINEAPPLE, COMPANY, LIMITED (a corporation),

Appellant,

vs.

MASAMARI SAITO and LIBBY, McNEILL & LIBBY OF HONOLULU, LIMITED (a corporation),

Appellees.

ORAL ARGUMENT OF EDWARD HOHFELD ON BEHALF OF APPELLANT.

FILED
OCT 2 8 1920
F. D. MONCKTON,
CLERK.

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(OCTOBER 18, 1920.)

May it please the court: plaintiff and appellant in this case, the Hawaiian Pineapple Company, Limited, whom I shall hereafter call the Pineapple Company, is a canner of pineapples in the Hawaiian Islands; respondent Saito is a Japanese, independent grower of pineapples there; and respondent, Libby, McNeill & Libby of Honolulu, Limited, whom I shall hereafter call the Libby Company, is also a canner of pineapples there, and is one of the three

or four companies competing with the Pineapple Company.

On the 18th of May, 1916, the Pineapple Company made a contract in writing with Saito for the sale of certain pineapples that Saito might grow upon the Island of Oahu for the period of four years from the date of the contract.

It is the contention of the Pineapple Company that Saito was obligated to sell not only the pineapples which he grew on his then present holdings, situated in the district of Leilehua, where he resided, but also all pineapples that Saito might grow on subsequently acquired lands during the period of his contract.

It is the contention of Saito and of the Libby Company, on the other hand, that only those pineapples are included in this contract which Saito might grow during the period of four years on the holdings which Saito had at Leilehua at the time when he entered into this contract.

The proper interpretation of this agreement between the Pineapple Company and Saito is the main, if not the only, question in the case.

Passing, for the time being, the discussion of this question, let us proceed with the historical narrative of the case.

Within a very few weeks after Saito had made this contract of May 18, 1916, with the Pineapple Company, he acquired two other leasehold interests. His present holdings at the time that he made the

contract consisted of two leasehold interests acquired from the Oahu Railway & Land Company, and consisted of about 150 acres of arable land, and the two subsequently acquired leasehold interests which consisted of approximately 57 acres of arable land, were also obtained from the Oahu Railway & Land Company, and were also situated at Leilehua. A part of the 57 acres embraced within the two subsequently acquired leaseholds had previously been planted to pineapples, and in consequence there was a certain amount of pineapples which were ready for delivery during the years 1916 and 1917 from these subsequently acquired lands. A part of the acreage, however, had to be planted to pine, the fruit of which would be ready for delivery some two or three years thereafter, since it takes a pineapple from eighteen to twenty-four months to mature.

The record shows that Saito, without objection, delivered the pineapples from the subsequently acquired lands for nearly two years after he entered into his contract with the Pineapple Company, and the latter paid him the same price for these pineapples as it did for the pineapples grown on his other two leaseholds which he held at the time the contract was made, this price being the one named in his contract. This fact is important, because the evidence shows that pineapples became worth more and more as time went on, because of the increased demand for the fruit. Saito continued, as I say, to make these deliveries of pineapples from his subsequently acquired lands until the 1st day of

April, 1918, when the Libby Company approached Saito and offered him $1.50 more per ton for his pineapples. Saito then claimed he was not obligated to deliver the subsequently acquired pineapples to the Pineapple Company, and accordingly made a contract with the Libby Company under date of April 1, 1918, and proceeded to make delivery of these pineapples to the Libby Company.

The pineapple market was such at the time that pineapples were extremely scarce. The canners could not secure as many pineapples as they needed in order to fill their current orders, and, relying on this fact, that other pineapples were not obtainable in the market, an injunction was sought by the Pineapple Company to restrain Saito from delivering any more of these pineapples to the Libby Company. The Circuit Court held that a proper case was presented for the exercise of the equitable jurisdiction of the court, and construed the contract as including pineapples produced from the subsequently acquired lands, and hence granted an injunction, both temporary and permanent.

On appeal, the Supreme Court of Hawaii, while also holding that it was a proper case for the exercise of the equitable jurisdiction of the court, construed the contract as not including pineapples grown on the subsequently acquired lands, and dissolved the injunction and dismissed the case.

An appeal was promptly prosecuted from the decree of the Supreme Court to this court, and ap-

plication was made to this court for the continuance of the injunction while the appeal was pending, so that the subject matter of the suit might not be entirely lost, as it would necessarily be if the injunction were not kept in force. A temporary restraining order was issued by this court, but after argument (the record of the pleadings and evidence not being at that time before the court, but only a copy of the contract) this court held that the construction of the contract by the Supreme Court was correct and that the contract did not include pineapples grown on the subsequently acquired lands, and dissolved the temporary restraining order and denied an injunction pending this appeal.

(Hawaiian Pineapple Company v. Masamari Saito and Libby, McNeill & Libby, 260 Fed. 153 (August 21, 1919).)

The main point of appellant's opening brief is this—that, admitting that the contract considered by itself may be ambiguous, the evidence which is now before the court, showing the surrounding circumstances of the subject matter and of the parties at the time that this contract was entered into demonstrates that the construction contended for by the appellant is the correct one, and that the evidence will further show that the practical construction of the contract by the parties was in strict accordance with the meaning of the contract as contended for by appellant.

I will therefore ask the indulgence of the court while I call to its attention a few of the salient

points in the evidence showing the surrounding circumstances.

Saito is an independent grower. He has been planting pineapples for ten or twelve years past at various places on the Island of Oahu, and since February, 1913, at Leilehua on lands leased to him by the Oahu Railway & Land Company. During 1914 and 1915 the pineapple industry, due to under consumption, had been disastrous to the independent growers because of the prevailing low prices, and there were several thousand tons of fruit ripening in 1915 which were not covered by contracts with canners, either through failure of the growers to accept the contracts offered them, or because they had been unable to make contracts—an exceptional condition—and which fruit the growers were willing to sell for almost any price. Pineapples sold, in 1915, for as low as $5.00 per ton for the large fruit —some at $8.00 per ton. In Saito's contract with the Pineapple Company the price for 1916 was $14.00 per ton, with a provision for an increase of price for the succeeding years according to a certain schedule named in the contract. In May, 1916, the pineapple business was just emerging from this period of depression. The Pineapple Company thought it saw daylight ahead, with an increasing demand, and decided that it was wise to make contracts with such growers as it was able to contract with for a period covering several years ahead. The grower always contracts ahead and the canners always make provision for their packs by contracts

for from one to five years. This has been customary with both planter and canner for the past fifteen years. In May, 1916, Saito had pineapples planted on lands under two leases from the Oahu Railway & Land Company, which consisted of about 150 acres of arable lands, these leases having from nine to ten years yet to run. All of Saito's holdings at that time were at Leilehua, Oahu, where Saito resided, and consisted solely of these 150 acres of arable land embraced within these two leaseholds. Saito had no other holdings elsewhere than at Leilehua, nor did he own or control any lands or pineapples anywhere in the Island of Oahu save the 150 acres aforesaid. At about the same time that the contract was executed, the following endorsement was made by a clerk of the Pineapple Company upon the contract, near the bottom of the last page, below the signatures of the parties: "Approximately 150 acres. Approximately 1500 tons. (Class B 200 tons)." Saito in his answer (Transcript, p. 137) says that when the representative of the Pineapple Company called on him to execute the contract of May 18, 1916, he asked Saito how many acres he then had and what it would produce, and Saito told him he had 150 acres at Leilehua.

These, then, are the salient points in the evidence showing the surrounding circumstances. The evidence shows that the situation of the pineapple industry at that time (in 1916) was such that growers who had been unable to sell their pineapples just previously for even $5.00 to $8.00 per ton,

were now offered from two to three times that amount. It may be fair to presume that Saito as such grower was very anxious to grow as many pine apples during the period of this contract as possible, in order to have the advantage of this new and high level of prices. It may also fairly be presumed on behalf of the Pineapple Company, since it was willing to pay the $14.00 per ton, that it thought it saw daylight ahead and that it was anxious to get control, through contracts, of as many pineapples as possible for the next few years, and the evidence further shows that all that Mr. Saito had at the time by way of present holdings, whether of lands or pineapples, consisted of the lands embraced within these two leases situated at Leilehua, where he resided, and that, at that time, he had no holdings elsewhere, anywhere in the Island at Oahu.

With these points of evidence in mind, I will ask the court to consider the contract itself, and first let us turn to the obligation of the planter, since it is the obligation of the planter which the Pineapple Company is endeavoring to enforce in this suit. At the top of page 6 of Appellant's Opening Brief, the obligation of the planter is set forth. It reads as follows:

> "The planter agrees that he will deliver to the Pineapple Company under the terms and conditions and with the exceptions hereinafter contained, all the merchantable Smooth Cayenne pineapples he may grow at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu, during the term stated."

The first point to which I wish to call the court's attention, in view of the argument of the other side, is this, that the words "at Leilehua" are a locative ablative, as it were, and constitute an adverbial phrase modifying "grow"; that the words "elsewhere on the Island of Oahu" modify "grow"; that the words "that he may own or control on the Island of Oahu" refer back to the only antecedent, "pineapples"; thus the obligation is to sell *pineapples that he may grow at Leilehua, pineapples that he may grow elsewhere on the Island of Oahu, or pineapples that he may own or control on the Island of Oahu,* during the term stated.

It is an admitted fact in this case that some Japanese planters not only grow pineapples, but they make arrangements with other Japanese to grow pineapples for them, and thereby they own and control them and are able to contract with reference to them, with canners. The last clause respecting pineapples that he might own or control was added, no doubt, to cover not only the pineapples which he might technically himself grow, but that he might own or control through his dealings with other Japanese growers.

The second point I will call the court's attention to, is that the words "may grow" and "may own or control" imply futurity. It is the pineapples which, *during the term of the contract,* the planter may grow, or own or control, not merely the pineapples he happens to be growing at the very time the

contract was signed. Into the obligation of the Pineapple Company the respondents propose to insert the word "now", so as to give the words "that he may own or control in the Island of Oahu" a present tense (Respondents' Reply Brief, p. 10). Yet we have seen that in the unambiguous obligation of the planter, futurity is clearly implied. In order to preserve the balance and harmony between the two mutual obligations of the parties, futurity must be imported into the verbs in both obligations, that of the planter and that of the Pineapple Company. Although respondents must admit, as indeed the Supreme Court held, that futurity is clearly implied in the verbs contained in the planter's obligation, respondents and the Supreme Court have imported the present tense into the verbs appearing in the obligation of the Pineapple Company.

The third point I will call the court's attention to is that the words "present holdings" may be added after the word "Leilehua" without in anywise changing the meaning or scope of the planter's obligation. The sentence would then read as follows: "Pineapples he may grow at Leilehua, on his present holdings, or (which he may grow) elsewhere on the Island of Oahu, or (pineapples) that he may own or control on the Island of Oahu, during the term stated."

The argument of respondents to the effect that in the obligation of the Pineapple Company which we will presently call to the attention of the court,

the words "elsewhere on the Island of Oahu", and "that he may own or control on the Island of Oahu", refer to "present holdings", and not to "pineapples", is based solely on the fact that in the preceding paragraph of the contract containing the obligation of the Pineapple Company, the words "present holdings" are inserted before the word "Leilehua". Yet if in the obligation of the Pineapple Company these words be inserted after the word "Leilehua", no possible ambiguity would remain. Therefore, by the introduction of the words "present holdings" after the word "Leilehua" in the obligation of the planter, we do not thereby make the word "elsewhere" modify "present holdings", or the words, "that he may own or control", modify "present holdings", as suggested by respondents.

Let us next consider the obligation of the planter *in the light of the evidence.* It is an admitted fact that the parties knew that all holdings that Saita had at that time consisted of the 150 acres at Leilehua. Is it possible that the parties would add the words "or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu, during the term stated", if it had been their intent to contract only with reference to definitely known holdings at the time of the contract, which they knew were located at Leilehua and nowhere else? It would seem that the addition of these words furnishes a conclusive answer to the above question, when the evidence showing the surrounding circumstances is considered.

There is no contention that this language in the obligation of the planter, considered by itself, is at all ambiguous, and the Supreme Court held that the obligation of the planter, considered by itself, was broad enough to include pineapples grown on subsequently acquired holdings (Transcript, p. 187).

With this observation in mind respecting the grammatical construction, and the logical and natural meaning, of the planter's obligation, let us now turn to the paragraph of the contract containing the obligation of the Pineapple Company, which is quoted in Appellant's Opening Brief at the bottom of page 5 and the top of page 6. It is as follows:

> "The Pineapple Company agrees that during the term of four years beginning May 1, 1916, and ending April 30, 1920, it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated, all the merchantable Smooth Cayenne pineapples that may be grown by the planter on his present holdings at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu."

It is the contention of the appellant that in the obligation of the Pineapple Company the words "elsewhere on the Island of Oahu" modify "grow", and not "present holdings", and that the words "that he may own or control on the Island of Oahu" modify "pineapples" and not "present holdings". Respondents contend, on the other hand, that this obligation must be read as follows: "All pineapples that may be grown by the planter on his *present*

holdings at Leilehua, or *on his present holdings* elsewhere on the Island of Oahu, or *on his present holdings* that he may *now* own or control on the Island of Oahu''. If we had only the obligation of the Pineapple Company before us, I admit that there would be some basis for that construction. Far be it from me to say that considered by itself, that is not a possible construction of this clause. But I ask the court if the construction which appellant contends for, even without regard to the other parts of the contract, is not equally as possible a construction as that contended for by respondents. The question is, what is the proper construction, and, in the light of the evidence, the necessary construction?

The construction contended for by respondents is not correct, we submit, for the following reasons: In the first place, such a construction is out of harmony with the clear and unambiguous language contained in the obligation of the planter. In our consideration of the obligation of the planter we saw that without any ambiguity the word ''elsewhere'' was an adverbial modifier of ''grow'', and that the words ''that he may own or control'' refer to ''pineapples'' and not to ''present holdings''. Since the language in the obligation of the Pineapple Company is susceptible of the same identical construction as is demanded in the case of the obligation of the planter, is it not the natural and obvious thing for the court to construe the obligation of the Pineapple Company so that its construction

will harmonize with, and not contradict, the unambiguous language in the planters obligation?

In the second place, if futurity must be imported into the words "may grow" and "may own or control", in the planter's obligation, the same construction should be given to the verbs in the obligation of the Pineapple Company, and not the "present tense", as suggested by respondents (Reply Brief, p. 10).

In the third place, the construction contended for by respondents would make redundant the words "present holdings that he may own or control on the Island of Oahu", since Saito's present holdings would necessarily be already covered by the words "present holdings at Leilehua or elsewhere on the Island of Oahu".

Again, in three subsequent paragraphs of this contract which have been set forth in the Opening Brief of the Appellant, at pages 17 and 18, the Pineapple Company made provision that in case of the destruction of its factory by fire, or in case of strikes or riots, it might temporarily be relieved from its obligation to take the pineapples. How have the parties defined the obligation of the Pineapple Company, *"all obligation on the part of the Pineapple Company* to pay for any *pineapples grown, owned or controlled* by the planter"? According to the construction of the Supreme Court and according to the contention of respondents, there are no pineapples provided for in the obligation of the Pine-

apple Company, except pineapples *grown* by the planter on his present holdings at Leilehua, or *grown* on his present holdings elsewhere on the Island of Oahu, or *grown* on his present holdings which he may now own or control on the Island of Oahu. And yet in these three paragraphs we have the parties themselves defining the construction of the obligation of the Pineapple Company as being that of furnishing pineapples *grown, owned or controlled* by the planter. I want to say in passing that this provision of the contract apparently was not called to the attention of the Supreme Court in the argument there. An examination of the briefs fails to show that this language was considered by the Supreme Court. I do not know whether it would have made any difference, but it occurs to me that it might well have raised some considerable doubt in the mind of the Supreme Court as to the correctness of the construction which that court placed upon the contract, to the effect that "elsewhere" modifies "present holdings", and that the words "that he may now own or control" modify "holdings" instead of "pineapples".

Again, if it was the intention of the parties to contract with reference to pineapples only on present holdings at the date of the contract, and since it appears without conflict in the evidence, that all that Saito had at the time was 150 acres and that the Pineapple Company expressly asked him how much his present holdings were, and that he told them only those 150 acres, what meaning can be given to the

rest of the paragraph which, as respondents contend, includes "present holdings elsewhere on the Island of Oahu"—which admittedly Saito had not at the time—or "present holdings that he may own or control on the Island of Oahu"—which admittedly Saito had not at the time? Would not those words be meaningless if the contract was construed as present holdings at Leilehua, or present holdings elsewhere on the Island of Oahu, or present holdings that he may own or control on the Island of Oahu during the term stated.

We have here two clauses in the contract, namely, those of the planter and of the Pineapple Company, which contain reciprocal obligations. The planter's agreement is perfectly free from ambiguity and means exactly what the appellant contends for. There is some ambiguity in the obligation of the Pineapple Company considered by itself, yet if the two mutual obligations can be so read together and construed as to give meaning and force and effect to every clause of the agreement, and bring the two mutually interdependent obligations into harmony and balance, I ask the court if it is not the more natural construction to read the ambiguous portion in the light of the unambiguous portion, and not vice versa, which would result in wrenching the language of the obligation of the planter from its setting and give it an entirely different construction than is required by its wholly unambiguous language.

Judge HUNT. Was there any evidence tending to show that the planter was a sort of broker, endeavoring to buy pineapples, or was he merely a planter, growing on his own places, for sale?

Mr. HOHFELD. The evidence shows that he was an independent grower; that he had, before the making of this contract grown pineapples for several years, on different parts of the Island of Oahu. The appellant says in its brief, and I take it that it is substantially so, that many growers make a practice of not only growing pineapples themselves, but of contracting with other Japanese to grow pineapples for them. I do not think the evidence shows anything more than that. I do not think Saito is anything more than a mere grower, who may have had some sort of loose relationship with other planters whose output he might control. He might be called a boss grower. I think that is about the most the evidence shows. I do not think he was a broker at all. Does that answer the question of your Honor?

Judge HUNT. In getting at the meaning of the word "control", I had in mind where the evidence would appear to justify the construction that at the time the parties made the contract they had in mind that he might be a man who would go out and control, although he did not grow, the pineapples that he might control or dispose of.

Mr. HOHFELD. In the brief of the appellant they take the position that he was not a broker; that

he was one of the class with whom it was customary to go out and make arrangements with other growers and get options on other pineapples, and thus control them; that it was for that reason that that clause was put in. I think that is correct. Both parties seem to agree, so far as that goes, as to what those words, "own or control", mean.

It occurs to me, therefore, that in the light of the intrinsic evidence furnished by the four corners of the contract itself, that the construction contended for by appellant is the proper one, not only because the obligation of the Pineapple Company had thus been defined by the parties themselves, as we have seen from the parts of the contract quoted on pages 17 and 18 of appellant's opening brief, as meaning pineapples *grown, owned* or *controlled* by the planter, but also under the construction contended for by respondents, the words suggested by respondents, "present holdings that he may (now) own or control on the Island of Oahu", would be meaningless and redundant. The other side, furthermore, in order to make good their point, have to import the present tense into the words "may own or control", whereas admittedly it must be the future tense in the obligation of the planter. And if any doubt remains, from a consideration of the contract alone, we submit that when read in the light of the evidence of the surrounding circumstances, all possible ambiguity is removed.

Passing now from a consideration of the intent of the parties at the time of entering into this con-

tract, let us see what the practical construction of the contract was. What was the subsequent history of the parties in dealing with this contract and the subject matter thereof? If the contract meant what Saito and the Libby Company contend for, would it not be fair to assume that when Saito came into control of, or grew pineapples, on the subsequently acquired leaseholds a few weeks afterwards, when the evidence shows that the pineapple market was steadily rising, and that pineapples were getting worth more and more as time went on, would it not be a fair assumption, I say, to think that Saito would either have offered these pineapples to the Pineapple Company at the increased price, or, if the Pineapple Company would not take them at that price, Saito would have sought elsewhere and sold them to another Company? But Saito did not do anything like that. The pineapples from his subsequently acquired leaseholds he sold to the Pineapple Company at the price named in his contract, and continued to do so until he was tempted by the offer of the Libby Company on the 1st day of April, 1918, when he was offered $1.50 per ton more for these pineapples.

Furthermore, the evidence shows that a part of these 57 acres of the subsequently acquired leaseholds had to be planted to pineapples. Saito had to go to considerable expense to plant the pines, which would not mature for from eighteen to twenty-four months thereafter. This was a matter of considerable expense. The evidence shows that it was the in-

variable custom of the planters, before they would plant and grow, to connect up with some of the canners. The evidence is that Saito himself was not a canner. It was the invariable custom of those planters to make arrangements with a canning company for the sale of their product, so that they would not be at the mercy of, perhaps, a falling market. But Saito did not make any new arrangements either with the Pineapple Company or with any other pineapple company, with reference to the pineapples which would be planted and which would mature and be ready for sale during the next four or five years. The Pineapple Company received and paid for these pineapples at the same price provided for by the original contract, although Saito might have sold them to other companies for a higher price. But, more than that, for the second of these leaseholds which he acquired in the early part of August, 1916, Saito needed $6000 to enable him to buy it. He did not have the money. To whom did he apply for the $6000? To the Pineapple Company, and the Pineapple Company loaned him the $6000, so that he might acquire the second leasehold interest. Did the Pineapple Company intend to loan Saito $6000 to raise pineapples for a rival company, when pineapples were so scarce in the Hawaiian market? If there had been any doubt in their mind that these pineapples were covered by their existing contract, would they not have covered those pineapples by the mortgage? They took the leasehold itself as security, but they did not cover these pineapples by

the mortgage. Neither did they make, or insist on Saito making, any new contract with them, providing for the delivery to them of pineapples grown on this leasehold for which they lent the $6000. Yet if they had not believed that they were already legally entitled to these pineapples under the terms of their contract, would it not have been the ordinarily prudent and business-like thing for the Pineapple Company to have insisted, as one of the conditions for the loan, that Saito make a supplemental contract with them for the delivery to them of these pineapples? But no; the Pineapple Company was so anxious to increase its receipt of pineapples that it was willing to loan the $6000 so that he might acquire the leasehold interest. They loaned that money for a year. It was payable on the 10th of August, 1917, a year after Saito acquired the leasehold interest. What does Saito say as to this matter? Simply, "I just continued to give these pineapples to the Pineapple Company because I owed them some money and I wanted to get rid of my debt as soon as possible." But is there any inherent verity in his statement? If he had sold these pineapples to others he would have received even more money in the same length of time, and would have been able to discharge his obligation to the Pineapple Company the sooner. But more than that, on August 10, 1917, he had this debt entirely paid off. But he continued to sell the pineapples from these subsequently acquired leaseholds just the same, and continued to do so up to the first of April, 1918.

And it is fair to presume that if the rival Libby Company had not approached Saito and tempted him with a higher offer, he would have gone on to the end of his contract and turned those pineapples over to the Pineapple Company.

(Here followed respondent's oral argument.)

Mr. Hohfeld. Before adverting again to the matter of the construction of the contract, I shall briefly consider the points made by counsel for the respondents as to the matter of equitable jurisdiction and the question as to the finality of the decree.

As to the point of the finality of the decree, as counsel stated, this matter was before this court at the time that application for the injunction was made. The court in its opinion (260 Fed. p. 154) said:

> "We think that by the decision of the Supreme Court of the Territory, which vacated the decree of the lower court, and which ordered a dissolution of the injunction which had been issued by the lower court, and which also ordered the bill dismissed, the essential rights of the parties were determined, and that the actual point of controversy was decided so far as the courts of the Territory had jurisdiction to decide them. The order of the Supreme Court, remanding the case for proceedings consistent with the opinion, left to the lower court nothing to do by way of adjudicating the essential rights of the parties."

Respondents in their brief (p. 62) cite the case of Rumsey v. N. Y. Life Ins. Co., et al., No. 3444, decided by this court September 7, 1920, in which the appeal was dismissed because the decree was

not final. An examination of the opinion in the Rumsey case, however, will disclose that the cause was merely remanded to the trial court "for such further action compatible with the decision as may be necessary". In the case at bar, however, the lower court was instructed to "dismiss the complainant's bill of complaint filed therein". The additional part of the order instructing the court to take such other or further proceedings prior or subsequent to the dismissal as may be consistent with the opinion, is mere surplusage. It would be the duty of the trial court to do so, regardless of this part of the Supreme Court's decree.

The record, however, shows that there is nothing for the Circuit Court of Hawaii to do but to dismiss the bill.

Counsel for respondents have undertaken gratuitously to make some ex parte remarks about other proceedings respecting the asessment of damages for the injunction. I am not familiar with the procedure in Hawaii in that behalf, but I would be surprised if that were a matter for the Circuit Court to adjudicate in this action. The procedure that we are familiar with here, and which obtains generally, is for a separate suit to be brought on an injunction bond for the settlement of such damages. Counsel has gone outside of the record to suggest something which I do not think the court should take any notice of.

Mr. Ulrich. I beg your pardon. It does appear in the record.

Mr. Hohfeld. If this decree is affirmed, the respondents have their action for damages against the Hawaiian Pineapple Company on the bond put up by the Hawaiian Pineapple Company when the injunction was issued. But that is a separate action. But even assuming that counsel's contention were correct, such action would only be supplemental to and in aid of the decree of dismissal.

Thus in Montgomery Light & Power Co. v. Montgomery Co., 219 Fed. 963, the court said:

> "While there are expressions to be found to the effect that the whole litigation must be disposed of in order for the decree to be a final one, yet an examination of each case cited for respondents will reveal the fact that this means nothing more than that all of the equities and the rights of the parties as presented by the pleadings in the cause must be determined and whenever a decree does determine the equities of a bill and the issues presented by it, the decree if a final one, notwithstanding the cause may be retained for an accounting between the parties and an accounting ordered in aid of the execution of the decree."

It follows, therefore, that even assuming, for the sake of argument, that counsel were right (which I do not concede) that the court would assess damages in connection with the dismissal of the bill, this would be only in the nature of an accounting subsequent to the dismissal of the case.

Coming now to the point of equitable jurisdiction, I will not say much on that, because counsel for respondents makes but a single point against the

equitable jurisdiction of the court. He concedes the fact that no other pineapples could be secured. If the Pineapple Company had commenced an action at law against Saito, all that the company could have recovered as damages would have been the difference between the price it would have had to pay for other pineapples and the contract price. Counsel has said that the pineapples which we had contracted to buy from Saito we had resold to other parties and that our damages were ascertained. Counsel did not mean, of course, to mislead, but his statement is quite inaccurate. The Pineapple Company did not contract for the resale of these pineapples. It had contracted for a sale to various third parties of the *canned* pineapples. Indeed, at the time that the suit was commenced it was the year 1918, and it was the canned pack deliverable during the season of 1918 that was interrupted in part by the refusal of Saito to deliver the pineapples in question. The Pineapple Company contracted to buy the raw product and contracted to sell the manufactured product. As to the loss on the sale of the canned products, *non constat* that those damages would be recoverable in an action at law against Saito, unless the case could be brought within the principle of the case of Hadley v. Baxendale, 9 Ex. 341. The Supreme Court held that there was no evidence which showed that the principle in the case of Hadley v. Baxendale was applicable (Transcript, p. 181). So the natural, proximate damages would only be the difference between

what the company could buy other pineapples for and the contract price.

The strongest case which counsel could cite—I presume it is the strongest because he makes a selection from a list of cases cited in 36 Cyc. 556. There are quite a number of cases cited in the note in Cyc., but counsel cites only one of them in his brief, and it is fair to presume that it was the strongest case. The case cited by counsel is that of Marthinson v. King, 150 Fed. 48 (Respondents' Reply Brief, p. 58).

A brief statement of the facts in this case will show that its principle is not at all applicable to the case at bar. The defendant King owned some growing timber and some camp outfits. Plaintiff Marthinson was a broker. Plaintiff went to King and said he had a chance to sell the standing timber and camp outfits to somebody. King asked $6000 for the property, and the plaintiff made an agreement with him to buy the property for $6000. On the very same day, the plaintiff, Marthinson, made a contract for the resale of the timber to a lumber company for approximately $12,000. When King heard about the contract he immediately entered into a conspiracy with the lumber company and sold the growing timber and the personal property directly to the lumber company, and thus defrauded Marthinson out of his profit of $6000. In an action by the plaintiff asking that the timber be turned over to him, the court said there was no need of that. The plaintiff had a clear claim for definite

damages measured by the loss of his profits, to wit, $6000. That is all that case stands for. To make the case applicable here, you would have to say that the Pineapple Company had a contract with Saito for pineapples, and that the Pineapple Company was going to sell these raw pineapples the same pineapples—to somebody else, and that Saito conspired with the purchaser and sold directly to the third party, and cheated the Pineapple Company out of its profits in the resale of the raw pineapples. Or, again, to make the Marthinson case similar to the case at bar, one would have to say that Marthinson bought the standing timber from King over a period of years, with the intention of manufacturing it into lumber and reselling it, if possible, at a profit, over a period of years; that some two or three years afterwards Marthinson had a contract to sell some lumber, and that King then refused to turn over the growing timber; that Marthinson could not buy growing timber elsewhere, and was unable to complete his contracts for the sale of lumber, to his loss. It certainly would not follow that Marthinson could have recovered from King the loss of his profits on the contract for the sale of the manufactured timber.

Let us now return to the matter of the interpretation of the contract, which I think is the chief, if not the only, point in the case.

In the first place I wish to call the attention of the court to the statement on pages 8 and 9 of respondents' reply brief, as follows:

> "The appellant in its brief adopted the rather curious procedure of constructing an imaginary argument for the appellees, one which is not contended for by them at all, and then of proceeding to demolish that imaginary argument. Appellant says that it is our contention that the phrase, 'that he may own or control on the Island of Oahu", found in the paragraph outlining the obligation of the Pineapple Company refers to and modifies "present holdings" and not "pineapples", and that, therefore, the Pineapple Company agrees to buy only pineapples which may be grown by the planter and not pineapples which may be owned or controlled by him. * * * This is not our contention. Our contention throughout has been that the Pineapple Company contracted to purchase all pineapples which might be grown by the planter on his holdings at Leilehua or all pineapples which might merely be owned or controlled by the planter on present holdings or at the present time," etc.

The Supreme Court in its decision (Transcript, pp. 186 to 187) said:

> "In the first paragraph of the contract quoted above, the company agreed, during the term of four years, to buy all the merchantable smooth Cayenne *pineapples that might be grown by the planter on his 'present holdings'* at Leilehua or elsewhere on the Island of Oahu, or that he might own or control on the Island of Oahu."

If there still be any doubt as to what the Supreme Court meant by this language, or what respondents contended for before the Supreme Court, a couple of extracts from their briefs filed in the Supreme Court will remove all possible doubt. Thus respond-

ents in their opening brief, which they filed as appellants before the Supreme Court, said:

> "The first quoted paragraph from the contract contains the agreements on the part of the Pineapple Company; that is, what it agrees to purchase, and which we submit means his *present holdings* at Leilehua, his *present holdings* elsewhere on the Island of Oahu, or his *present holdings* that he may own or control on the Island of Oahu."

In the reply brief of the Pineapple Company filed in the Supreme Court, it is said:

> "Appellants (Saito and the Libby Company) raise the contention in their brief that all these clauses refer back to present holdings; namely, *present holdings* at Leilehua, *present holdings* elsewhere on the Island of Oahu, *present holdings* that he may own or control on the Island of Oahu."

And in their closing brief, Saito and the Libby Company said:

> "We believe that, considering the whole transaction as brought out in the testimony at the trial, there is only *one reasonable construction* which can be placed upon this language, and that construction is that the Pineapple Company was obligating itself to purchase all the pineapples which Mr. Saito might grow *during the term stated* upon any *holdings* which he then *owned* or *controlled* upon the Island of Oahu."

We contended for the same construction of this contract before the Supreme Court as is contended for before this court, to the effect that the words, "that he may own or control on the Island of Oahu",

refer to "pineapples" and not to "present holdings". Saito and the Libby Company in their brief before this court now concede that the position of the Pineapple Company before the Supreme Court and before this court is correct, and they entirely repudiate, in their brief before this court, the construction of the contract contended for in the Supreme Court, which they there refer to as the "only one reasonable construction". Respondents in this court now seek to "mend their hold", and they disclaim all paternity for their intellectual child before the Supreme Court.

The change of position of respondents whereby they now admit that the words, "that he may own or control on the Island of Oahu", refer back to "pineapples", is quite a material concession, from one point of view, in that it brings these words in the obligation of the Pineapple Company into perfect balance and unity with the same words in the obligation of the planter, where we have seen that this clause necessarily refers back to the word "pineapples" as its only possible antecedent. The only words which respondents now seek to wrench from their natural meaning, and from their balance and unity with the obligation of the planter, are "elsewhere on the Island of Oahu". They still maintain that these words modify "present holdings", which appear before the word "Leilehua" in the obligation of the Pineapple Company. Yet we have also seen that if we transpose these words so that the sentence would read, "that may be grown by the planter at

Leilehua, (on his present holdings), or elsewhere on the Island of Oahu", such a construction would be impossible, and the words "elsewhere on the Island of Oahu" would necessarily modify the words "may grow". What, therefore, is the answer and the only answer which respondents attempt to make to the construction contended for by appellants? In their brief (p. 12) they say:

> "The term 'Leilehua', for example, designates a general locality on the Island of Oahu, the exact boundaries of which are at best very indefinite. Just where Leilehua ends and another named locality begins no one can say within any degree of certainty. * * * Consequently in designating localities, for the purpose of safeguarding the parties in the event that any dispute might arise as to whether or not the place designated has been accurately described, a phrase is very commonly inserted in indentures and contracts of this character, substantially in the language found in this particular contract, namely, 'or elsewhere on the Island of Oahu'."

But the evidence shows that the leasehold interests of Saito which he owned at the time were designated by metes and bounds, and were definitely and exactly known at the time. So well known were they that an informal memorandum stating the amount of acreage involved was endorsed at the foot of the contract. Even assuming that respondents' idea was correct; that "elsewhere on the Island of Oahu" was put in for good measure, to include present holdings in or near the district of Leilehua, the words used should have been "in the neighbor-

hood of Leilehua''. Certainly if the exact boundaries of the district of Leilehua were uncertain, they could have covered the point by adding the words ''or in the vicinity or neighborhood of Leilehua''. The contract, however, uses the words ''elsewhere on the Island of Oahu'', which shows, of course, that the mere neighborhood or vicinity of Leilehua was not contemplated, but that the whole Island of Oahu was included as the area from which pineapples grown by Saito should be furnished.

Another objection to this interpretation is the fact that in the obligation of the planter, in the next paragraph, we have seen that the words ''elsewhere on the Island of Oahu'' modify the words ''may grow'', as an adverbial phrase of place, whereas respondents contend that the words ''elsewhere on the Island of Oahu'' refer to ''present holdings'' in an adjective sense. But is it not more natural to construe the words ''elsewhere on the Island of Oahu'', which occur in the obligation of the Pineapple Company, in the same sense that they are used in the unambiguous obligation of the planter?

Counsel for respondents also suggests that in the obligation of the planter the last words, ''during the term stated'', should be lifted out of their location there and should be put in the obligation so that they will modify the word ''deliver'', and be read, ''that the planter will deliver during the term stated'', the pineapples in question. Even if these

words could be so interpreted (which we do not admit), nevertheless, futurity must necessarily be imported into the words "may grow" and "may own or control" in the obligation of the planter equally whether the words, "during the term stated", are used at the end of this obligation or not. Furthermore, we have noticed that in the extract from their closing brief (ante p. 29) before the Supreme Court they made the contention that the words, "during the term stated", did modify the word "grow" and the words "own or control". They have taken a new and different position for the first time, in their brief before this court.

Now what is the next point which respondents make? They say that a clause of this contract provides that we should deliver lug boxes at the railroad station at Leilehua and that Saito must deliver his fruit to Leilehua. The Supreme Court said (Tr. pp. 187-188):

> "Assume that subsequently to the date of the contract Saito acquired land at Waimanalo or at some other locality remote from and inaccessible to Leilehua, and that upon this land he grew and produced pineapples. In that event, if the construction urged by complainant is to be adopted, Saito would be required to deliver these pineapples to the company f. o. b. cars at Leilehua at $14.00 per ton, when from the geographical and physical conditions prevailing and which are within the common knowledge of all, the expense of transportation alone would far exceed that amount."

But I think this argument of the Supreme Court proves a little too much. In the first place, the same objection would hold even if the contract should be construed as respondents contend, to wit, "present holdings at Leilehua or present holdings elsewhere on the Island of Oahu". The words "elsewhere on the Island of Oahu" would, of course, include Waimanalo, and unless we are to accept the interpretation of these words as meaning in the neighborhood or vicinity of Leilehua, as suggested by respondents, the same objection would exist in the one case as in the other, whether, in other words, the contract be interpreted to apply only to holdings which Saito had at the time at Leilehua, or anywhere else on the Island of Oahu, or whether it included holdings which he might subsequently acquire. This point apparently escaped the attention of the Supreme Court.

Again, these Japanese growers are men of more or less limited means. As shown by the evidence here, when Saito wanted to increase his holdings he had to borrow $6000 from the Pineapple Company. He lived at Leilehua. The only holdings which he had at the time were at Leilehua, and so the parties naturally inserted as the delivery point on the railroad, the district of Leilehua through which the railroad ran. It would be fair to presume that if any other holdings were acquired by Saito, they would probably be somewhere in the same neighborhood. But suppose they were not. The Pineapple Company could not compel Saito to grow pineapples

a hundred miles or a thousand miles away from Leilehua. If he did so that would be entirely up to him. If he wanted to grow pineapples at Waimanalo, before he should do so he should go to the Pineapple Company and tell them that he intended to grow pineapples over there provided the Pineapple Company would accept delivery of the pineapples at such and such a place, which under the circumstances would be a reasonable point for the delivery of the pineapples to the Pineapple Company. And the Pineapple Company would, of course, consent to any reasonable arrangements in that behalf.

Another argument respondents make as to this same point is this: The Pineapple Company has practically bought this man Saito. They own him hand and foot. He cannot stir. Every pineapple he raises he must turn over to the Pineapple Company. They say that the Pineapple Company did not buy pineapples, but that they bought Saito hand and foot. Well, I do not know of anything against public policy for a company to buy all the raw materials it may need in its plant, from a certain man, for a certain period of time, or for a gatherer or producer of raw material to say that for a certain time he will agree to gather up all the raw material in a certain district and sell it to a manufacturing company. Such contracts are made every day. I see nothing illegal about that, or unbusiness-like, for that matter. But even if there were some point to counsel's objection, the objection comes with par-

ticular ill grace from the mouth of counsel for the Libby Company. In this connection permit me to call the court's attention to the contract of April 1, 1918, between the Libby Company and Saito, which constitutes Exhibit "F" to our complaint (Transcript, p. 81). Counsel say, in their reply brief (p. 25) that:

> "The most casual examination of the contract of April 1, 1918, between Saito and the Libby Company will at once show that Libby was contracting only with respect to pineapples to be grown on lands definitely designated and the extent of which was perfectly ascertained. * * * Libby, McNeill & Libby has never for a moment contended that their contract of April 1, 1918, covers any pineapple lands which may be acquired after the execution of the contract."

In answer to this statement of counsel, and in entire refutation thereof, I will direct the court's attention to page 86 of the Transcript. It will there be seen that in express words, future acquired lands were included within the terms of the Libby Company's contract. In the obligation of Saito the following language is used: That he will sell to the Libby Company pineapples grown on "any and all other lots, pieces or parcels of land hereafter and between the said first day of April, 1918, and the said 31st day of March, 1925, acquired, owned or controlled by the planter in said City and County of Honolulu".

And in the obligation of the Libby Company which directly follows, it is provided that the Libby

Company will purchase from the planter, that it will buy, all pineapples "that may be grown by the said planter on the planter's said holdings, *or elsewhere in the City and County of Honolulu*, Territory of Hawaii, or that the planter may own or control in the City and County of Honolulu", etc.

It will thus be seen that Saito was bound for the period of five years to the Libby Company to sell them all the pineapples that he might grow, own or control during said period in the City and County of Honolulu, whether on lands owned by him at the time of the making of the contract, or acquired thereafter during the term of said contract. I am advised that the Island of Oahu is a part of the City and County of Honolulu, so the physical boundaries of the Libby contract are at least as great as, if not greater than, the boundaries named in the contract of the Pineapple Company.

And where, let us ask, was delivery for these pineapples provided by the Libby contract? The same provision in that regard is contained in the Libby contract (see Transcript, p. 87) as in the contract of the Pineapple Company, it being provided that the planter shall deliver the fruit f. o. b. cars at Leilehua, Oahu. It does indeed seem strange that counsel should raise this point in objection to the contract of the Pineapple Company, when the same identical provision is contained in the contract of the Libby Company, and it seems ill advised, to say the least, that counsel should mention this point as

militating against the construction of the contract as contended for by appellant. I am sure that counsel for the Libby Company would be the last one to tell Saito that he was not under obligation to sell all pineapples from subsequently acquired lands, to the Libby Company, if Saito should endeavor to sell any of them to the Pineapple Company.

Counsel for the Libby Company has endeavored to give some explanation for Saito's subsequent conduct in delivering pineapples from subsequently acquired lands to the Pineapple Company for nearly two years after his contract. They say he was an ignorant Japanese. Maybe he was. The record does not so show. For all we know by the record, he may have been a very educated man. Let us assume, however, that he was a very ignorant man. There is such a thing as actions speaking louder than words. Although he might not be able to read the contract, he, nevertheless, understood its meaning, or he would not have made delivery of these pineapples from subsequently acquired lands, when he might have received more for them from another canning company. But Saito sold us those pineapples not only while the debt owed to our company was unpaid, but after the same had been discharged on August 10, 1917 (he continued for six or eight months thereafter to sell us these pineapples. Counsel says that there is nothing in the record to show that Saito could have sold these pineapples to anybody else and that it does not appear even that the Libby Company was in business at

that time. In answer to this argument of counsel, however, permit me to call the court's attention to a paragraph in the answer filed by the Libby Company (Transcript, p. 102):

> "Respondent (the Libby Company) alleges that it did, in January, 1917, and for a long time prior thereto have a contract with one Shiroma, a lessee of Chang Chau, for all pineapples grown by him upon lot 1 described in said lease of August 10, 1916, and that complainant well knew of said contract; that complainant, although learning of said contract between said respondent and Shiroma, permitted respondent Saito to deliver to it pineapples from said lot 1," etc.

This allegation in the Libby Company's answer shows not only that it was in business in January, 1917, but had been for several years prior thereto, and that up to the time that Saito bought out Chang Chau the pineapples from this very land were being bought by the Libby Company, and the Libby Company in its said answer complains of the conduct of the Pineapple Company in permitting Saito to deliver these pineapples to the Pineapple Company instead of permitting Saito to go on delivering them to the Libby Company as had his predecessor, Shiroma.

This quotation from the Libby Company's answer shows how much weight there is to the argument of counsel for respondents when he tries to explain away the conduct of Saito in selling pineapples to us from subsequently acquired lands for

nearly two years after the making of the contract. It shows that Saito, when he secured these pineapples from the Chang Chau lot, thought that he could not go on as Shiroma had previously done, delivering these pineapples to the Libby Company, but must, under his contract, deliver them to the Pineapple Company. And Saito went along, honestly and in good faith, observing his contract as he and the Pineapple Company understood it, until the rival Libby Company tempted Saito with a higher price for his pineapples, and Saito, in violation of his contract, proceeded thereafter to make delivery of these pineapples to the Libby Company.

For all these reasons we submit that the decree of the Supreme Court should be reversed and the decree of the Circuit Court should be affirmed.